NO. 22787

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM G. EVERETT

Appellant

vs.

JOE W. VON BRIMER

Appellee

APPELLANT'S OPENING BRIEF

APPEAL FROM

THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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STATEMENT OF JURISDICTION

This action was commenced in the United States District Court for the Central District of California by the filing of a Praecipe for Issuance of Deposition Subpoenas in Case Not Originating in This District on January 3, 1968, by JOE W. VON BRIMER, The Senior Party in Patent Office Interference No. 95,373, pursuant to Title 35, Section 24, of the United States Code through which the Congress has provided The United States District Courts with subpoena power as to patent matters.

The Appellant, in propris personum, sought an Ex Parte Motion to Quash Subpoena Duces Tecum, filed January 16, 1968, and an Order Denying Motion to Quash Subpoena

Duces Tecum and Staying Compliance with said Subpoena for a Period of Ten Days was entered January 26, 1968 [Tr-31].[1]

This Court has jurisdiction to review the final decision entered in the District Court pursuant to Section 1291, Title 28 of the United States Code.

A timely Notice of Appeal from said final decision [Tr-31] was filed on February 5, 1968 [Tr-34].

CONCISE STATEMENT OF THE CASE

The appellant, a registered patent agent, has performed services for and has incurred out-of-pocket expenses on behalf of the appellee, Joe W. Von Brimer. To date, $3766.74 of the total amount due, namely $4316.74 remains due. Approximately one half of the uncollected amount represents patent services rendered in direct connection with Interference No. 95,373 [Tr-2 et seq.].

At no time had the appellee, or his associates, ever objected to any one or more of the twenty-five (25) different debit notes which were submitted to him between January 1966 and September 1966 and which support this claim. On February 28, 1967, the claim for $3766.74 was assigned to the Business Credit Corporation for collection and suit was brought in the Municipal Court of Los Angeles, Case No. 380,758 on March 16, 1967. So far, the appellee has successfully avoided service.

In January of this year, the appellee sought access to the files in appellant's possession. Such access was conditioned upon the appellee's remitting moneys due. Instead of paying, the appellee obtained the instant Subpoena Duces Tecum whereupon the Ex Parte Motion to Quash or Modify was filed pursuant to Rule 45(b)(1)&(2) for reasons that the deposition would compromise the claim assigned and therefore was unreasonable and oppressive and that the leverage encouraging payment by virtue of the possessory lien under Section 3051

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1. Throughout this brief, reference to the Clerk's Transcript will be designated "Tr", and reference to the Reporter's Transcript of Proceedings of January 5 and January 17th, 1968, as "R1" and "R2" respectively.

of the California Civil Code would be destroyed.

The District Court, although well aware of the equities involved [R1-18, at lines 6-11; R2-4, at lines 14-22; R2-8, at lines 5-25; R2-9, at lines 17-25; R2-10, at lines 6-13 and 16-25; R2-14, at lines 1-11] and even questioning why the appellee has not put up a bond [R1-18 at line 2] to take care of the claim for $3766.74 asserted against him by the appellant, – denied the relief sought and granted a ten-day stay pursuant to Rule 62(a) [Tr-31] noting that the Court's decision is like a final order as far as the appellant is concerned [R2-14, at line 6] since the value of the asserted lien is gone once the deposition is taken [R2-10, at line 16 et seq.].

The questions involved concern the nature of protection to be afforded under Rule 45(b)(1) and to what extent the Federal Courts would permit discovery powers to be abused, especially in those instances where the documents sought by way of subpoena duces tecum could be equitably obtained by tendering payments for the patent services rendered and to which no objections as to billing had ever been made. This question was raised by the Memorandum in Support of Motion to Quash or Modify Subpoena Duces Tecum [Tr-6].

Another question relates to Rule 45(b)(2) regarding the advancement of reasonable costs of producing the books, papers, documents, etc. and was also raised as Point II in the last mentioned memorandum [Tr-7].

The third question pertains to the existence of a possessary lien in accordance with California Civil Code, Section 3051 which states clearly that

> " . . . [E]very person who . . . renders any service has a special lien, etc. . . . "(Emphasis added).

This question is raised as Point III in the aforesaid memorandum [Tr-8].

SPECIFICATION OF ERRORS

I

The District Court, by not quashing or modifying the subpoena duces tecum for reasons that same was unreasonable and oppressive pursuant to Rule 45(b)(1), has abused its

discretion with the ultimate result that an injustice will be perpetuated unless the order entered denying the Ex Parte Motion to Quash or Modify Subpoena Duces Tecum is vacated.

II

The District Court, in not conditioning denial of the Ex Parte Motion to Quash or Modify Subpoena Duces Tecum to the extent that the appellee do equity and tender payment to the Court for money due appellant for past patent services rendered (over which no objections were ever made), has abused its discretion in permitting one, a debtor, with unclean hands to assert the subpoena powers of the Court against another, his creditor, who has offered to deliver all upon payment of the debt and in so doing the District Court is helping a debtor avoid his debts.

III

The District Court, in not conditioning denial of the Ex Parte Motion to Quash or Modify Subpoena Duces Tecum to the extent that the appellee must put up a bond to take care of the claim for moneys due and/or agree to appear in Municipal Court of Los Angeles, in Case No. 380,758, both of which the District Court had judicially noticed and had commented on accordingly, likewise has abused its discretion to the end that the appellant shall be irreparably damaged unless the decision of the District Court be modified to require the appellee to post said bond and/or agree to receive service in the Municipal Court suit.

IV

The District Court, in construing Section 3051, California Civil Code, relating to possessory liens, has committed reversible error in ruling that the appellant has no possessory lien notwithstanding Section 3051 which clearly states that every person lawfully in possession of an article of personal property and rendering a service to the owner has such a special lien thereon, which ruling is contrary to the provisions of California Civil Code, Sections 13 and 14 relating to construction.

SUMMARY OF ARGUMENT

The District Court should jealously screen all instances where its discovery powers are sought. If alternatives are available which would produce the same or equal results the Court should be so advised. If the party seeking the aid of the Court does not have clean hands, – as here, being a debtor trying to obtain documents through the subpoena duces tecum approach, which documents the party against whom the discovery power is to be asserted has offered to deliver in toto upon payment of the uncontested amount – then the Court should exercise increased caution and carefully weigh the equities involved. Should a balance not be struck, however slight and for whatever reason, the reviewing body should unhesitantly right the wrong.

In the instant case, the District Court could, and should, have normalized the inequities present by requiring the debtor/appellee to post a bond and/or to cease avoiding service in the Municipal Court case else the creditor/appellant's Ex Parte Motion to Quash or Modify The Subpoena Duces Tecum shall be granted. That such conditions could balance the equities involved and were before the District Court is evidenced by their source being the Court itself.

Instead the District Court became engrossed with appellant's alternative Point III [Tr-8] relating to the possessory lien theory, to which counsel for appellee so persistently alluded in his effort to overshadow the equities, or lack of them, which faced his client. The existence of a possessory lien is abundantly clear, Section 3051 reciting "has" and not "may have". That the claim has been assigned only complicates the matter in that appellee now serves also as trustee charged with the safekeeping of the documents. But whether the appellant has or has not a possessory lien, the taking of his deposition serves only to compromise his assignment for collection purposes and to destroy whatever leverage to compel payment of an uncontested money obligation he has, both of which perpetuate an injustice as to him who has done no wrong by one who has repeatedly promised to pay and has successfully avoided service since suit was filed in Municipal Court on March 16, 1967, Case No. 380,758.

I. Rule 45(b)(1) provides for protective relief against unreasonable and oppressive

subpoenas.

> ". . . the court, upon motion made promptly . . . may (1) quash or modify the subpoena if it is unreasonable and oppressive . . .". Rule 45(b)(1), Federal Rules of Civil Procedure.

An exhaustive search of the case law has failed to reveal pertinent case law. But, it is respectfully submitted, the absence of such authority should be of no consequence. The inequities in the case nevertheless still persist; morever, the unfairness of permitting one to avoid his debts through the exercise of the discovery process would seem to compound the inequities. How often, could we say, that even those with the best of intentions stray unintentionally outside the limits whereupon discovery becomes a weapon and not a tool? But to let one, who benefited from services rendered, who never protested as to the fees charged, who promised repeatedly but has yet to pay, and who has successfully avoided service in a suit brought for money due, – to let such a party be the recipient of the District Court's aid is, it is respectfully submitted, unreasonable and oppressive in every sense of the meaning and within the purview of the Rule 45(b)(1).

The District Court stated at the hearing held on January 5, 1968,

> "Well, why doesn't he [the appellee] put up a bond then to take care of the claim that Mr. Everett asserts, and await the Court's resolution of the claim for compensation. *I mean, he is not playing fair with Mr. Everett either.* If this is a matter of balancing equities, if it has any equitable significance, why then I think that this is a significance. In fact, I don't think you want to take his deposition. I think you want the documents. I don't think whether you get his deposition or not makes – –"(Emphasis added) [R1-18, commencing at line 5].

Whereupon, Mr. Wallen, counsel for Mr. Von Birmer, again interrupted the Court for the third time. [2]

That the District Court had noted the inequities in this matter cannot be disputed. But the order entered totally disregards the inequities present and is tantamount to doing nothing to right the wrong. Truely such an order constitutes an abuse of discretion, the correction of which is within the power of this reviewing body.

At the hearing held on January 17, 1968, the District Court also stated:

> " . . . but I [The Court] don't have to help somebody avoid his debts and make it easier for him [the appellee]. Mr Everett is very sincere about this, so the statements made that the Municipal Court is going to protect him, that's just a figment of our imagination if the defendant avoids service. I mean, if he would appear in the Municipal Court action and submit himself to having that Court adjudicate it, why then there is a reality to it. Otherwise there is no." [R2-4, commencing on line 15]

The Court also stated at the second hearing:

> " . . . and [if] I don't give him [Mr. Everett] a stay on my order, then of course his appeal is for nothing. *In other words, if you once take the deposition and look at the documents and compare them with your copies, there is nothing left. He has nothing left.*
>
> As I say, I think I will be contributing to injustice if I didn't grant him a stay on that. Now, that's on the merits.
>
> On the other hand, you argue, and I only point out by way of passing, that the Municipal Court is going to protect Mr. Everett. *But it is not.* (Emphasis added) [R2-8, commencing at line 15].

It is submitted that the District Court was sufficiently apprised of the facts herein, had

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2. It may be of interest to note that at the hearings of January 5 and 17 respectively opposing counsel comments required 287 and 88 lines in the Reporter's Transcript whereas the Court required 150 and 181 lines and Mr. Everett only 82 and 24 lines respectively.

failed only in not doing enough and therein abused its discretion. In not wishing to perpetuate an injustice, the District Court should have either granted the Ex Parte Motion or, in the alternative, conditioned its denial by requiring the appellee to post a bond and/or accept service and submit himself to the jurisdiction of the Municipal Court.

The District Court also said:

> "Now, Mr. Everett has pointed out in his statement that he has been advised at least the V B Corporation, whatever it is, has been dissolved and doesn't exist any more. That is the easy way of getting out of it, too. Or that assets have been purchased, but the debts didn't go along with the purchase." [R2-9, lines 23 et seg.]

It should be noted that the appellee was not responsive when the Court commented above. Instead, they quickly chose to remain silent and not admit or deny and instead turned their attentions to the ten-day stay topic and be content with that. Such conduct may be applauded as good advocacy but it certainly cannot be said to truly serve the ends of justice.

II Rule 45(b)(2) provides for protective relief requiring the person on whose behalf the subpoena is issued to pay for the reasonable cost of producing the books, paper, and documents.

The appellee has offered to pay $140.00 saying:

> " . . . We offered to pay Mr. Everett. We offered to pay him $140.00 in collecting this packet of documents to deliver to us." [R2-22, at lines 7-8].

In the interest of justice, the District Court should have incorporated at least this offered amount in its order denying the motion. The amount, it is true, is trivial when compared to the debt this appellee owes the appellant. But, it would appear to be better than nothing.

III Section 3051 California Civil Code sets forth provisions wherein a special possessary lien is established to protect those who render any service to the owner thereof for the compensation which is due from the owner for such personal property.

The applicable statute Section 3051 of the California Civil Code recites:

> "Every person who, while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, employed for the protection, improvement, safekeeping, or carriage thereof, *has a special lien thereon, dependent on possession, for the compensation, of any, which is due to him from the owner for such service;*" (There follows a numerous listing of specific classes of proprietors, all of which were subsequently added by way of ammendment. [See Tr-15 at lines 8 to 13]). (Emphasis added)

Opposing councel has directed his opposition solely to the existence, or not, of a lien, perhaps for reasons that he recognizes the inequities present and concludes that it is better to say nothing and then maybe they will just go away. In this regard, the Court's attention is also directed to the appellee's Motion In Opposition to Ex Parte Motion to Quash Subpoena Duces Tecum [Tr-2] and to the fact that the caption makes no mention of "Or Modify" as does the appellant's memorandum [Tr-2].

It appears, after an exhaustive search, that no judicial body has had the opportunity to construe Section 3051 of the California Civil Code in a situation analgous to what exists here. But, the absence of a precedent should not restrict a court of competent jurisdiction from dispensing justice. In the instant case, justice can be severed by striking a proper balance of the equities involved without deciding whether or not the California statute does in fact establish a special possessory lien to protect patent agents from compromising their claim or the assignments of such claims for collection.

In another aspect, opposing counsel, in assuming arguendo that a special lien is created, advocates that such a lien should be analogous to an attorney's lien in scope. But, as opposing counsel has pointed out [Tr-16, at lines 19-25], there is no attorney's lien in California.

Concerning attorney's lien, a noted authority on California law has written that two kinds of attorney's liens to secure expenses and fees are recognized in most jurisdictions: (1) a general retaining (possessory) lien on papers and personal property of the client coming into the attorney's possession and (2) a specific charging (nonpossessory) lien or equitable right to satisfy his expenses and fees out of the judgment recovered. To quote Professor Witkin:

> "Our courts have refused to recognize either, and have declared in a number of cases that the attorney's sole remedy is in an action at law against his client. (See *Wagner v. Seriotti* (1943) 56 C. A. 2d. 693, 697, 133 P. 2d. 430.) **The California rule is perhaps the result of a mistaken view of the common law taken in** *Ex Parte Kyle* 1 C. 331 (see Cal. L. Rev. 594). And in any event, . . . there is no public policy objection to such security; an attorney's lien does not automatically come into existence in the ordinary case, but it does have statutory recognition in a few special situations, and can be freely created by express contract." 1 Witkin, California Procedures, Page 30, (1954).

In his 1965 Supplement, Professor Witkin writes:

> "California may soon join the majority of states in recognizing the attorney's charging lien. (See *Isrin v. Superior Court* (1965) . . . 45 C. R. 320, 403 P. 2d. 728, *Actions,* Supp., [Section] 83 A [dictum: "it is problematical whether much vitality remains in the *Kyle* rule].) Supplement, Witkin, California Procedure, Page 16, (1965).

Whethter or not the law will develop along the above lines as Professor Witkin points out would appear rather questionable in view of the number of controversies addressing themselves to this problem. But, a step in the proper direction, made by this Honorable Court, could well advance the cause along its way, especially in those cases where the equities are so strongly in favor of the party asserting the possessory lien and who needs the protection against abusive discovery proceedings as is the case here. It should also be

pointed out that a nonpossessory charging lien is of little value in those instances, again as here, where the debtor/client has avoided service thereby frustrating any attempt to obtain the necessary judgment from which his expenses and fees can be recovered.

Either the vacating of the District Court's Order entered January 26, 1968, or the modifying of said Order requiring the appellee to post a bond and to submit himself to the jurisdiction of the Municipal Court else the Order entered is vacated is respectfully requested.

Dated June 20, 1968, at Los Angeles, California.

William G. Everett
In Propris Personum

CERTIFICATE OF CONFORMANCE

I hereby certify that I have examined the provisions of Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the above-tendered brief conforms to all of the requirements of said Rules 18, 19 and 39.

WILLIAM G. EVERETT